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**SECRETARY, BOARD OF
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**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

UTAH CHAPTER OF THE SIERRA CLUB,
et al, Petitioners,

vs.

UTAH DIVISION OF OIL, GAS & MINING,
Respondents,

ALTON COAL DEVELOPMENT, LLC, and
KANE COUNTY, UTAH,

Respondent/Intervenors.

MOTION TO POSTPONE

Docket No. 2009-019

Cause No. C/025/0005

ORAL ARGUMENT REQUESTED

Alton Coal Development, LLC ("**Alton**" or "**ACD**"), the permittee of Coal Hollow Mine Permit No. C/025/0005 ("**Permit**"), through its attorneys, hereby moves the Utah Board of Oil, Gas and Mining ("**Board**") to postpone any hearing on the *Petition for an Award of Costs and Expenses including Reasonable Attorney's Fees* (the "**Fee Petition**") filed by the Utah Chapter of the Sierra Club, Southern Utah Wilderness Alliance, Natural Resources

Defense Council, and National Park Conservation Association (collectively, “**Petitioners**”). For the reasons set forth below, any Board action on the Fee Petition should be postponed until a final non-appealable order is issued by the Utah Supreme Court fully resolving this dispute on the merits.

ARGUMENT

The recovery of legal fees is generally an exception to the prevailing “American Rule” that each party to a legal proceeding should pay its own legal expenses. *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683–84 (1983). One exception is where the award of fees is established by statute. Utah’s Coal Mining and Reclamation Act (“**UCMRA**”) governing coal mine permitting does provide for an award of attorneys’ fees, expert witness fees, and costs to any person when the tribunal finds that it is proper to do so.

Whenever an order is entered under this section or as a result of any adjudicative proceeding under this chapter, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the board to have been reasonably incurred by that person in connection with his participation in the proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review, or the board, resulting from adjudicative proceedings, deems proper.

Utah Code § 40-10-22(3)(e) (LexisNexis 2010). This provision is virtually identical to that contained in section 525(e) of the Surface Mining and Reclamation Act of 1977 (“**SMCRA**”). *See* 30 U.S.C. § 1275(e) (2009). The Secretary of the Interior has adopted rules governing the award of attorney’s fees and costs in adjudications conducted before the Department under his SMCRA authority. *See* 43 C.F.R. §§ 4.1290–4.1295 (2010). This Board has not promulgated rules further implementing or interpreting the comparable provision of UCMRA for proceedings before this Board.

As a threshold matter, even though there is statutory authority for this Board to award a fee in appropriate circumstances, Alton objects to the Fee Petition and will separately advise the Board of the reasons that the Fee Petition should be denied. Apart from the objection on the merits of the claim, Alton asserts that the Fee Petition is not timely presented to the Board and for the following reasons requests that the Board postpone any consideration of the Fee Petition until the pending review of the Board's Order is resolved by a final non-appealable decision of the Utah Supreme Court.

I.

AN AWARD OF COSTS AND ATTORNEYS FEES BY THE BOARD IS PREMATURE WHILE THE SUPREME COURT IS CONSIDERING PETITIONERS' APPEAL

The most compelling reason to postpone any consideration of the Fee Petition is that this case is not yet finished. The Board issued its final order in this matter on November 22, 2010, disposing of all 17 claims presented by Petitioners for adjudication, affirming the contested decision of the Division on all counts and awarding no relief of any kind to Petitioners. *Utah Bd. of Oil, Gas & Mining, Findings of Fact, Conclusions of Law and Order*, Docket No. 2009-019. On December 8, 2010, Petitioners appealed the Board's decision for review by the Utah Supreme Court and any final decision of that body is many months away. Only after appealing the Board's Order did the Petitioners file the Fee Petition herein on December 21, 2010. Petitioners' Fee Petition claims success on the merits based on a single, narrow aspect of this matter, however the merits of Petitioner's challenge to the Board's Order is at the foundation of their appeal to the Utah Supreme Court. As a result, whatever entitlement to a fee that Petitioners may claim regarding their efforts before this body is subject to the pending appellate review.

Because UCMRA provides that an award of fees is also available for judicial review of the Board proceeding, it is likely that the Board will again be called upon to decide another

such petition from one or more parties, possibly including the Petitioners, following the Utah Supreme Court's decision. This Board will use its resources more efficiently, and will be more fully advised regarding the propriety of any awards, if it defers any decision on the Fee Petition until it can be considered in the context of a final determination that fully clarifies all requests for award of fees and costs.

II. CONSIDERATION OF THE FEE PETITION IS IMPRACTICAL DUE TO COMPETING CLAIMS

As mentioned above, proceedings in this matter continue before the Utah Supreme Court, and legal fees for all of the parties continue to accumulate. Under the statute governing formal adjudications in this matter, the Board is required to conduct its hearings "to obtain full disclosure of relevant facts and to afford all parties reasonable opportunity to present their positions." Utah Code § 63G-4-206(1)(a). The conduct of a hearing, including the timing of consideration of particular matters within the overall course of a proceeding, is a matter within the administrative tribunal's discretion. In the present situation, there are sound reasons for the Board to exercise this discretion and postpone consideration of all fee petitions until the case is finally concluded on the merits.

Without question, the fees and costs incurred by Alton (as well as the Division and Kane County) in defending the permit before the Board are relevant facts that these parties are entitled to present at the proper time, whether or not any of the parties separately seeks recovery of its fees and costs from Petitioners. Moreover, the costs arising out of judicial review are also relevant facts that they are entitled to bring before the Board for consideration. The Board correctly determined that the Petitioners' claims were unsupported. Alton intends to seek fees and reimbursement for all of the expenses it has incurred in the defense of the

Permit. Depending on how the Utah Supreme Court rules, there will be a further issue as to which party has had more success on the merits including additional fee award(s).

This Board has expended a considerable amount of its time to hear the Petitioners' claims and it is a far more prudent use of its limited resources to resolve all fee issues within a single determination. Analyzing all conflicting fee requests at one time will allow the Board to weigh the merits of each and could result in offsets, credits or other determinations that should not be attempted *seriatim*. Otherwise, this Board may enter into piecemeal deliberations which could result in conflicting fee awards. Alton therefore respectfully suggests that the Board exercise its discretion and postpone consideration of possible fee awards until a fuller set of relevant facts is available to inform its decision.

III

IT IS PROCEDURALLY PREFERABLE TO WAIT ON THE OUTCOME OF THE APPEAL

As a general principal of law, when a party files a timely notice of appeal, the court that issued the judgment loses jurisdiction over the matters on appeal. *Saunders v. Sharp*, 818 P.2d 574 (Utah App. 1991). There is a limited exception to this general rule and that is the trial court, in this case the Board, retains jurisdiction to review collateral issues. The standard referred to in *Saunders v. Sharp* emanates from a decision in the case of *White v. State*, 795 P.2d 648 (Utah 1990). Many courts have determined that where attorney fees are permitted to be awarded to a successful party, the court has the right to review the fee requests, regardless of the fact that the court has otherwise lost jurisdiction of the underlying case.

Utah has adopted the collateral issues rule dealing with attorney fee requests, but this is not a hard and fast rule. While a court may consider collateral issues, there are limitations to

the rule. The key to whether the trial court should engage in the collateral issues review is fundamentally tied to the whether adjudication of the issue is dependent upon an issue that is likely to be addressed within the appeal and whether the consideration of the “collateral issue” is “in the interest of preventing unnecessary delay.” *Id.* The Utah Court of Appeals acknowledged the “collateral issue” rule in *Saunders v. Sharp*, with guidance from other jurisdictions. In footnote 11, the Court cited *Dent v. Simmons*, 61 Md. App. 122, 485 A.2d 270 (1985). When confronted with a similar issue in that case, the Court of Special Appeals of Maryland stated:

We recognize, of course, that in certain cases the issues relating to attorney's fees may be more time consuming and more complex than the case that gives them birth. Indeed, the decision of the appellate court on the matters in chief may even vitiate the basis for an award of counsel fee. Under those and possibly other circumstances, it may be wiser for the trial judge to defer determining the issue of attorney's fees until after completion of the appellate process. This we leave to the sound discretion of our trial judges.

Id. at 274.

So, while this Board may technically have the authority to review the question of fees, timing of the review is still critical. Without a detailed argument over the merits of the Fee Petition, it is fair to say that the crux of the Fee Petition is based upon the assertion that the “Division’s approval of the Coal Hollow Mine permit was based on incomplete cultural and historic resource information” (Fee Petition, p. 7). This matter will be specifically addressed by the Utah Supreme Court in the pending appeal.

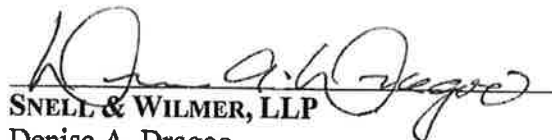
If the Board takes this matter under consideration and awards any fees to the Petitioners, then it potentially creates a puzzling scenario. If a favorable determination for the Petitioners on fees is followed by a Supreme Court determination that upholds the Board’s decision, then this Board would find itself in the awkward position of awarding fees against the

State of Utah on claims found to be without merit by the Utah Supreme Court. In light of this dilemma, this Board should wait to determine the issue of attorney fees until appellate review is final.

RELIEF REQUESTED

For the reasons set forth above, Alton requests that the Board defer its hearing on the matter of the Petition for Fees until such time as the Utah Supreme Court rules on Petitioners' pending appeal.

SUBMITTED this 26th day of January, 2011.



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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of January, 2011, I e-mailed a true and correct pdf copy of the foregoing **MOTION TO POSTPONE** to the following:

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